IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1166 OF 2002
IN
SUIT NO. 1369 OF 2002

1. Atul Ambalal Barot & Anr. .. Plaintiffs.

V/s.

1. Sujit Kumar Thakur Ram Adhar Singh and Anr. .. Defendants.

Mr.Pravin Samdani, Sr.Counsel with G.C.Mohanty i/by Kirit N. Damania & Co. for the Plaintiffs.

Mr.A.Y.Bookwala with Mr.M.M.Desai i/by Desai, Desai & Co. for the Defendant No.1.

CORAM : S. A. BOBDE, J.

DATED : 23rd JANUARY, 2007.

P.C.:

. By this notice of motion, the plaintiffs seek an order of this court, restraining the defendants from alienating, encumbering, selling, creating any third party rights, parting with or inducting any person in the suit premises i.e. 2nd and 3rd floor flats on the building under construction in question on plot No.48 of Vithal Nagar Co-operative Housing Society Ltd., J.V.P.D.Scheme, Juhu,Mumbai-49. The plaintiffs further seek an injunction restraining the defendant No.2

Co-operative Housing Society, which holds the land on which the building is situated, from transferring the interest and membership of the first defendant in the suit premises.

2. In the suit, the plaintiffs claim specific performance of agreements at Exhs."A" and "F" in favour of the plaintiff No.1 and "A-1" and "F-1" in favour of the plaintiff No.2 dated 09.11.1992 and 10.11.1992, respectively, in respect of the building on plot No.48 of the said Vithal Nagar Co-operative Housing Society.

3. The plaintiff No.1 is seeking enforcement of the main agreement dated 09.11.1992 at Exh.‘A’ and the supplementary agreement dated 10.11.1992 at Exh.‘F’ entered into with the defendant No.1. The plaintiff No.2 also seeks enforcement of similar agreements at Exh.‘A-1 and F-1’ entered into with the same defendant No.1. In brief the purport of these agreements is as follows :

> The defendant No.1 has constructed a house on the plot which comprises of ground floor and one upper floor. It appears that he intends to construct three additional floors being the 2nd floor, 3rd floor and 4th floor. By this

agreement, the first defendant agreed to construct additional floors and induct the plaintiff Nos.1 and 2 separately as tenants of the 2nd floor and 3rd floor respectively. The agreement is thus an agreement to construct additional floors and to induct the plaintiffs as tenants in respect of the first and one upper floor, i.e. 2nd and 3rd floor respectively. An important term is "an induction" of the plaintiff on payment of premium of Rs. 47 lakhs for obtaining the tenancy. The other terms etc., are not strictly required to be considered for the decision of the present notice of motion.

4. Mr. Bookwala, the learned counsel for the defendant No.1 raised a preliminary objection on the frame of the suit. According to the learned counsel, since there are separate agreements entered into by the first defendant with the plaintiff No.1 and plaintiff No.2 in respect of the second and third floor respectively, the suit itself needs to be dismissed on this ground alone. He relied on the judgment of the division bench of this court in the case of **Chandulal Suklal Shet vs. Dagdu Mahadu Chaudhari, reported in**

XXVII the Bombay Law Reporter page 472. That was a case in which five plaintiffs, who had five separate contracts with the same defendants, sued the defendants for and on the basis of the single contract for the sum of 850 maunds of cotton. The trial court having found that there was no such single contract of sale of 861 maunds of cotton; in the appeal, the division bench found it appropriate to dismiss the suit since the contract, on the date on which all the five plaintiffs have sued, was not in existence. In fact there were five separate contracts. The division bench directed the suit to be dismissed. The division bench observed as follows :

> "But it is a case where a number of plaintiffs file a suit on a cause of action which does not exist. Consequently, to allow any one of these plaintiffs to change the suit which was brought in the name of all into a suit brought by one of them would not come within the provisions of the Code which provide that no suit shall be defeated on a technical ground by reason of the mis-joinder of parties or causes of action".

. The said case has no application to the present case. In the present case the two plaintiffs have each sued the same defendants on the basis of the two separate contracts in their favour of which they seek specific performance.

5. Mr.Samdani, the learned counsel for the plaintiffs is right in his submission that the plaintiffs are entitled to jointly sue in view of the order 2 rule 3 of the C.P.C.; which authorises any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants to unite such cause of action in the same suit. Indeed, both the plaintiffs are jointly interested against the same defendants for a decree, requiring the defendants to construct and lease out the constructed floors to the plaintiffs i.e. the second and the third floor to the plaintiffs.

. **Order 2 Rule 3 reads as follows :**

> **"3. Joinder of causes of action.**--(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.
>
> (2) Where causes of action are united, the

> jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject matters at the date of instituting the suit."

6. More over the learned counsel for the plaintiffs is also right in his submission that Order 2 Rule 6, which was amended and introduced in 1977, clearly enables the court to order separate trials - where it appears that the joinder of causes of action in one suit may embarrass or delay the trial. **Order 2 Rule 6 reads as follows** :

> **"6. Power of Court to order separate trials.**-- Where it appears to the Court that the joinder of causes of action in one suit may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient in the interests of justice."

. In my view, it is clear that the suit cannot be dismissed on this ground alone because the two plaintiffs have jointly filed the same suit.

7. Coming to the merits of the matter, the plaintiffs claimed that the defendants have agreed to construct and let out the constructed portion to the plaintiffs and, therefore, the defendants should be restrained from alienating, encumbering, selling, creating any third party rights, parting with the possession or inducting any person in the suit premises on the 2nd and 3rd floor flats of the building under construction at Plot No.48 of Vithal Nagar Co-operative Hsg.Soceity Ltd., Juhu, Mumbai-49 and that by order of injunction the defendant No.2 Co-operative Housing Society should be restrained from transferring the membership and interest of defendant No.1 in the suit premises to any third party.

8. The learned counsel placed reliance on the agreements executed by the defendant No.1 in favour of both the plaintiffs. It must be observed that the defendant No.1 has clearly agreed to construct two floors in the said building and induct the plaintiffs as tenants in the constructed portion. But the question is whether this agreement is enforceable in law so as to confer on the plaintiffs a prima facie right to the injunction sought by them.

9. It is not necessary to go into details of the arguments made by both the learned counsel, particularly, those relating to the specific term in the agreement which provided for a specific term ‘a person’ who has to actually construct the building. According to the learned counsel for the defendants, the construction itself is supposed to be done by a company in which the plaintiff No.1 and his brother has an interest. According to the plaintiffs that makes no difference to the obligation on the part of the defendants to make the construction. As observed earlier, it is not necessary to go into this aspect because if, prima facie, the contracts are not enforceable then the plaintiffs are not entitled to an injunction.

10. The first objection on behalf of the defendants about enforceability of the contracts arises on the basis of the clauses 2 and 3 of the agreement at Exh.‘A’. A similar clause in the other contract; i.e. clauses 2 and 3 specifically provided for a payment of premium by the plaintiffs of Rs.47 lakhs to the defendants. Admittedly, on the date on which this agreement was entered into i.e. 9th November, 1992, the payment of such premium was clearly violative of section 18 of the Bombay Rents, Hotel and Lodging House Rates

Control Act, 1947, which provides the landlord for receiving any premium etc. and make the receipt of such premium and provide a penalty for receiving such premium. The learned counsel for the defendants relied on the decision of the Supreme Court in the case of **Mannalal Khetan vs. Kedar Nath Khetan, AIR 1977 Supreme Court 536,** in which the Supreme Court has observed in paragraphs 19 & 20 as follows :

> "19. Where a contract, express or implied, is expressly or by implication forbidden by statute, no Court will lend its assistance to give it effect. (See Melliss v. Shirley Local Board, (1985) 16 QBD 446). A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. The penalty may be imposed with intent merely to deter persons from entering into the contract or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider what act the statute prohibits, but what contracts it prohibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is unenforceable. (See St.John Shipping Corporation v. Joseph Bank, (1957) 1 QB 267). (See also Halsbury's Laws of England Third Edition Vol. 8, P.141).

> "20. It is well established that a contract which involves in its fulfilment the doing of an act prohibited by statute is void. The legal maxim a pactis privatorum publico juri non derogatur means that private agreements cannot alter the general law. Where a contract, express or implied, is expressly or by implication forbidden by statute, no Court can lend its assistance to give it effect. (See Mellss v. Shirley Local Board (1885) 16 QBD 446). What is done in contravention of the provisions of an Act of the Legislature cannot be made the subject of an action."

. It appears that the above decision of the Supreme Court clearly applies to the prayer for enforcement of the contracts in question.

11. Mr.Samdani, the learned senior counsel for the plaintiffs, however, submitted that the illegality, if any, relates with the requirement to pay the premium. He submits that this clause is clearly separable from other clauses of the contract including the tenancy. In other words, it is submitted on behalf of the plaintiffs that the clause which requires the plaintiffs to pay premium is separable from other parts of the contract including creation of tenancy and therefore, the entire contract is tainted with the illegality, therefore, it cannot be enforced. In support of this contention, the learned counsel relied on the English decision in the case of **Grace Reymer Investments Ltd., v. Waite and others, reported in [1958] 1 All E.R.-138.** That was a

case in which the court declined possession to the landlord on the ground that the contract of tenancy contained an agreement that the tenant would pay premium to the landlord. The court declined the relevant relief, interalia, on the ground that the tenant was the victim and had agreed to payment of premium because he wanted the premises on rent. Therefore, such a clause would not result in for invalidating the entire tenancy itself, resulting the tenants eviction. This case has no application to the present case.

12. It was, however, contended on behalf of the plaintiffs that the legality or illegality would have to be determined on the date of the demise which has not yet taken place. More over, since under the new legislation, it is not illegal to receive a premium, the contract must be taken to be valid since it is sought to be enforced today. This argument has no merit. The validity or invalidity of the contract has to be judged with reference to the state of the law which exists on the date it is made. Indeed the contract becomes actionable/ enforceable in law, on the date on which it has made and its legality cannot be decided on the basis of the subsequent changes in the law which may take place, specifically when it is sought to be made the basis of an injunction.

13. The plaintiffs' counsel also relied on the judgment of the Supreme Court in the case of **B.O.I.Finance Ltd., vs. The Custodian and others, AIR 1997 Supreme Court 1952,** where the Supreme Court held, vide para 44, that execution of each transaction envisaged the transfer of title in the securities. The valid part (the ready leg) of the transaction has been completed while the invalid part (forward leg) has to be ignored.

14. I am of view that these observations do not govern the case in hand, since the two transactions are not separable in any manner as in the case before the Supreme Court. Here the transaction is single, namely, creation of the tenancy. The requirement of payment of premium is one of the terms and conditions of the tenancy. It is not possible to ignore the illegal part, namely, the payment of the premium and to give effect to the legal part namely, the creation of the tenancy since the latter is to come into existence upon performance of the former i.e. the payment of the premium. It is also well settled that courts will not re-write the contract or give effect to a contract by modifying it. In this view of the matter, I am of view that the contracts in question cannot be formed the basis of the injunction

which the plaintiffs seek.

15. Though it is not strictly necessary to decide this aspect, there is also force in the contention on behalf of the defendants that the contract is a contract for the construction of a building. Such a contract is a contract which cannot be specifically enforced in view of section 14 of the Specific Relief act. This appears to be a consistent view of this court in regard to the development agreements, as is apparent from the decision in the case of **Gurudev Developers vs. Kurla Konkan Niwas-Co-op.Housing Society reported in 1999 (supp.) Bom.C.R. 257.** The distinction between a contract for construction and the development agreement is not material in this case because on either view, it involves the same consideration. In this view of the matter, the notice of motion is dismissed.

16. Mr. Samdani, the learned counsel for the plaintiffs at this stage prays for continuance of the order of the status -quo granted by the appellate bench in Appeal No. 913 of 2003, dated 17th November, 2003. In the facts and circumstances of this case, the said interim order shall continue for a period of six weeks from today.

17. Order accordingly.

(S.A.BOBDE,J.)

.....